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No. 77-1746

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED FAYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 573 F.2d 741.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on March 27, 1978. A petition for rehearing was denied on May 10, 1978 (Pet. App. 13a). The petition for a writ of certiorari was filed

on June 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government was barred by the doctrine of collateral estoppel from prosecuting petitioner for testifying falsely at a criminal trial at which he was acquitted.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on four counts of knowingly making false material declarations before a court of the United States, in violation of 18 U.S.C. 1623. Petitioner was fined $5,000 on the fourth count. Imposition of sentence on the other counts was suspended, and petitioner was placed on probation for one month. The court of appeals affirmed (Pet. App. 1a-11a).

In 1974 Harry and Rose Bernstein and their wholly owned company, Eastern Service Corporation, were convicted of securing false Federal Housing Administration (F.H.A.) appraisals for mortgages that they owned and serviced by bribing F.H.A. appraisers, one of whom was Edward Goodwin. See *United States* v. *Bernstein*, 533 F.2d 775 (C.A. 2), certiorari denied, 429 U.S. 998. On February 9, 1972, prior to the indictment in that case, petitioner, who was the Bernsteins' attorney, met with his clients and Goodwin and attempted to convince Goodwin

that he should not give any information to the grand jury that was then investigating the Bernsteins' activities. Unbeknownst to petitioner or the Bernsteins, however, Goodwin had already agreed to cooperate with the government investigation, and the entire conversation was tape recorded by a device concealed on Goodwin's person (Pet. App. 2a-3a).

The transcript of the recorded conversation established that both the Bernsteins and petitioner repeatedly urged Goodwin not to testify before the grand jury. They also urged Goodwin to discharge his attorney, who had recommended that Goodwin cooperate with the government, and replace him with another attorney who would be paid by the Bernsteins. Finally, the Bernsteins, with petitioner's apparent approval, offered Goodwin a job in their Florida office if his refusal to cooperate cost him his F.H.A. job (Pet. App. 3a).

Based on his conduct at this meeting, petitioner was indicted in the United States District Court for the Eastern District of New York for obstructing justice by wrongfully endeavoring to influence a witness, in violation of 18 U.S.C. 1503, and for aiding and abetting in the attempted bribery of the witness, in violation of 18 U.S.C. 201(d). After a non-jury trial, petitioner was acquitted on all counts. Petitioner's conviction on four counts of perjury arose out of his testimony at this trial.

The judge who presided at petitioner's obstruction and bribery trial entered specific findings of fact pursuant to Rule 23(c), Fed. R. Crim. P. In finding

petitioner not guilty of attempted bribery, the judge concluded that petitioner "did aid and abet the Bernsteins" (Pet. App. 17a) and that it was difficult to believe that petitioner did not know that his clients "were using him to aid and abet them in their scheme" (*id.* at 16a). The judge ruled, however, that he had a reasonable doubt whether petitioner had acted willfully and with the intent to corrupt and also whether the bribery attempt had in fact been completed at an earlier meeting that petitioner did not attend (*id.* at 16a-17a). With regard to the obstruction of justice count, the judge found that petitioner had advised Goodwin not to testify voluntarily before the grand jury and that he was at least partially motivated in that request by his desire to protect the Bernsteins, but that there was a substantial doubt whether he was not also attempting to advise Goodwin in order to protect Goodwin's rights (*id.* at 17a, 28a-29a). Since the judge could not find beyond a reasonable doubt that petitioner's *sole* motive was to avoid his clients' prosecution, he concluded that the government had failed to establish the corrupt intent required by the statute (*id.* at 26a-28a).[1]

ARGUMENT

Petitioner contends that his conviction must be reversed because the findings of the trial judge who

[1] The government sought to appeal the ruling on the obstruction of justice charge, contending that the trial judge had misconstrued the law, but the court of appeals held that the judgment of acquittal was not appealable. See *United States* v. *Fayer*, 523 F. 2d 661 (C.A. 2).

acquitted him of attempted bribery and obstruction of justice at the earlier trial collaterally estopped the government from prosecuting him for making false statements at that trial. The court of appeals correctly rejected this claim.

It is well established that the acquittal of a defendant following a trial on criminal charges does not automatically raise a collateral estoppel bar to his subsequent prosecution for perjury committed during the course of that trial. *United States* v. *Williams*, 341 U.S. 58, 63-65; *United States* v. *Gugliaro*, 501 F. 2d 68 (C.A. 2); *Adams* v. *United States*, 287 F. 2d 701 (C.A. 5). True, as petitioner notes, the doctrine of collateral estoppel has a role to play in such circumstances, but collateral estoppel "means simply that when an issue of ultimate fact has been determined by a valid and final judgment, *that issue* cannot be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (emphasis added). Hence, the doctrine does not prevent a perjury charge unless the "verdict in the [earlier] trial was a determination favorable to petitioner of the facts essential to conviction of the [false statements] offense." *Sealfon* v. *United States*, 332 U.S. 575, 578-579. Here, as the court below correctly decided (Pet. App. 6a-8a, 10a n.2), the specific findings of the trial judge at petitioner's obstruction of justice and bribery trial clearly show that the issues raised by the four false statement counts had not been previously resolved against the government.

The first count charged petitioner with perjury

for testifying falsely that his advice to Goodwin not to cooperate was limited only to the F.B.I., whereas he had actually advised Goodwin not to testify before the grand jury. Contrary to petitioner's claim that "the first trier of fact had specifically found such denials credible and had acquitted petitioner on that identical issue" (Pet. 6), the judge at the first trial found the facts determinative of this issue in favor of the government, stating that "what [petitioner] did was attempt to as I find beyond a reasonable doubt, influence [Goodwin] not to go voluntarily before the grand jury" (Pet. App. 28a; see also *id.* at 17a-18a, 22a, 24a). Petitioner was acquitted not because the court agreed that his advice related to the F.B.I. rather than the grand jury (see *United States* v. *Ryan*, 455 F. 2d 728, 733 (C.A. 9)), but because there was substantial doubt whether the advice not to testify before the grand jury had been given with a corrupt motive (see Pet. App. 7a). See *United States* v. *Williams*, *supra*, 341 U.S. at 64 n.3.

The second count alleged that petitioner testified falsely when he denied that the parties to the recorded conversation were discussing "accusations and allegations" that the Bernsteins had paid bribes to Goodwin. The court of appeals' opinion fully disposes of petitioner's claim that the prosecution on this count was barred because the judge at the first trial found that the government had not established beyond a reasonable doubt that petitioner did not truly believe in the Bernsteins' innocence (Pet. App. 7a-8a; footnote omitted):

> It is clear from the transcript that the parties were discussing "accusations and allegations" that Goodwin took money from the Bernsteins. That [petitioner] might have believed the Bernsteins innocent of these charges did not indicate in the slightest that the accusations had not been made. Indeed, if [the trial judge] was not convinced that the Bernsteins had been accused of bribery, his finding that Fayer believed them to be innocent was meaningless. Innocent of what? The Bernsteins were not being accused of murder or assault; they were being accused of bribery. [The trial judge's] finding that Fayer believed them to be innocent does not gainsay that the accusation was made and discussed; to the contrary, it confirms it. There was no estoppel barring [petitioner's] conviction on count II.

Count III involved Harry Bernstein's statement to Goodwin during the course of the recorded conversation that "If you say anything, it blows everything" (Pet. App. 8a). When questioned about this statement at the prior trial, petitioner had testified that he believed Bernstein was referring only to harm that might befall Goodwin. The indictment charged that this answer was false because petitioner in fact knew that Harry Bernstein had been referring to the possibility that Goodwin could "blow everything" for Bernstein himself, his wife, and his corporation. Once again, the court's findings at the prior trial did not resolve this issue against the government. Indeed, the trial judge found beyond a reasonable doubt that one of petitioner's motives in attempting to persuade Goodwin not to testify had been to "protect

the Bernsteins" (Pet. App. 28a). Although the judge also concluded that petitioner may have believed the Bernsteins to be innocent, that finding was not inconsistent with the government's theory at the perjury trial that, in making the statement, Harry Bernstein had been concerned with the problems Goodwin's testimony might cause the Bernsteins and Eastern Service Corporation and that petitioner was well aware of that concern.[2]

The fourth and last count charged petitioner with testifying falsely that his statement, "[p]lease stay out of it, please," in the recorded conversation had been directed to Rose Bernstein, in an effort to keep her from interrupting the conversation, rather than to Goodwin, in an effort to keep Goodwin's attorney out of the investigation. We note at the outset that petitioner expressly declined to rely on collateral estoppel at the perjury trial as a basis for the dismissal of this count and that he therefore waived his right thereafter to assert the claim (Pet App. 3a-4a n. 2). See *United States* v. *Perez*, 565 F. 2d 1227, 1232 (C.A. 2); *United States* v. *Scott*, 464 F. 2d 832, 833 (C.A. D.C.); *United States* v. *Buonomo*, 441 F. 2d 922, 925 (C.A. 7), certiorari denied, 404 U.S. 845; *Grogan* v. *United States*, 394 F. 2d 287, 289 (C.A.

[2] We note, moreover, that petitioner received an identical, concurrent sentence on the first three perjury counts, so that if any one of these counts was not barred by collateral estoppel it would be unnecessary for the Court to consider the issue with regard to the other two counts. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16.

5), certiorari denied, 393 U.S. 830; *Haddad* v. *United States*, 349 F. 2d 511, 513-514 (C.A. 9), certiorari denied, 382 U.S. 896.[3]

In any event, prosecution on Count IV was not barred by collateral estoppel because, as the court below noted (Pet. App. 10a n.2), the judge at the first trial made no findings with respect to the essential matters contained in this count. Although the government did argue during the obstruction trial that petitioner's remark had been addressed to Goodwin, the judge declined to decide the issue (Pet. App. 22a) and instead entered an acquittal based on his belief that petitioner may have been partially motivated by a good faith desire to give legal advice to Goodwin (*id.* at 26a). That conclusion, of course, was fully consistent with the allegation in the present case that petitioner had advised Goodwin to "[p]lease stay out of it" in order to keep his previously retained attorney out of the picture.

[3] We recognize that some courts have indicated that a double jeopardy claim may be cognizable on appeal even if never presented to the trial court. See, *e.g.*, *United States* v. *Gunter*, 546 F. 2d 861, 864-865 (C.A. 5), certiorari denied, 430 U.S. 947; *United States* v. *Anderson*, 514 F. 2d 583, 586 (C.A. 7); *Government of the Virgin Islands* v. *Smith*, 445 F.2d 1089, 1094 (C.A. 3). None of these cases, however, concerned a situation like that present here, which involves a claim of collateral estoppel (an essentially factual matter, unlike other double jeopardy contentions) that the defendant expressly declined to rely on (rather than merely failed to mention) as a ground for relief in the district court. There is no need for the Court to consider the waiver issue, in light of the court of appeals' correct rejection of petitioner's claim on the merits (Pet. App. 10a n.2).

Since none of the false statement charges at petitioner's second trial was dependent on facts resolved against the government at the first trial, there is no merit to petitioner's claim that the court of appeals' decision conflicts with *United States* v. *Nash*, 447 F. 2d 1382 (C.A. 4), and *United States* v. *Hernandez*, 572 F. 2d 218 (C.A. 9), in which perjury convictions following acquittals were found to be barred by collateral estoppel. *Nash* and *Hernandez* involved only the application of the doctrine of collateral estoppel to the specific facts of those cases. Neither case purports to hold that a perjury prosecution may not be instituted following an acquittal at the trial where the perjury occurred. To the contrary, both courts agreed with the court below that collateral estoppel does not bar a subsequent prosecution for perjury following an acquittal unless the factual issue was necessarily adjudicated at the prior trial. *United States* v. *Nash*, *supra*, 447 F. 2d at 1384-1385; *United States* v. *Hernandez*, *supra*, 572 F. 2d at 220.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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